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No. 595 and 596.

Def. of Atty. Gen.l (Richards & Soper for U. S. (on mo.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES. } No. 595.

GEORGE CURLEY, ALIAS GEORGE Cully, v. THE UNITED STATES. } No. 596.

MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES.	No. 595.
GEORGE CURLEY, ALIAS GEORGE Cully, plaintiff in error, v. THE UNITED STATES.	No. 596.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now comes the United States of America, by J. K. Richards, Solicitor-General, and P. L. Soper, United States attorney for the northern district of the Indian Territory, and moves the court to dismiss the writs of error allowed in the above-entitled causes for the reason that this honorable court has no jurisdiction to entertain said writs of error, or to pass upon any of the matters

and things alleged in the record in said causes for want of jurisdiction under the law.

J. K. RICHARDS,
Solicitor-General.

P. L. SOPER,
United States Attorney for the Northern District of the Indian Territory.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES.	No. 595.
GEORGE CURLEY, ALIAS GEORGE Cully, v. THE UNITED STATES.	No. 596.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF THE CASES.

Cyrus A. Brown, plaintiff in error in case No. 595, was indicted in the United States court for the northern district of the Indian Territory, charged with the crime of murder, which indictment was filed in the United States court for the Indian Territory, northern district, sitting at Muscogee on the 10th day of December, A. D. 1896.

On the 17th day of December, A. D. 1897, he was convicted of the crime of murder in said court, and the judgment of the court sentencing him to death was made on the 24th day of December, A. D. 1897. On the 1st day of February, A. D. 1898, the plaintiff in error filed a petition in said court for a writ of error from the Supreme Court of the United States and filed an assignment of errors. On February 8, 1898, a writ of error was allowed in said cause by Hon. David J. Brewer, associate justice of the Supreme Court of the United States, and on the same day a citation was issued in said cause, service of which was acknowledged on the 16th day of February, A. D. 1898. (See transcript of record, pp. 25–27.) Pursuant to the writ of error in said cause a transcript of the record in said cause was filed in the office of the clerk of the Supreme Court of the United States on the 23d day of February, A. D. 1898. The Government has filed its motion to dismiss the writ of error in said cause, for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

George Curley, alias George Cully, plaintiff in error in case No. 596, was indicted in the United States court for the northern district of the Indian Territory sitting at Vinita charged with the crime of murder, which indictment was filed in open court on the 21st day of October, A. D. 1897. On the same day the defendant took a change of venue to the United States court at Muscogee,

and a transcript of the record and the original indictment was forwarded to the clerk of the United States court at Muscogee, Ind. T. On the 13th day of December, 1897, at the December term of the United States court for the northern district of the Indian Territory, at Muscogee, the indictment heretofore found was re-referred to the grand jury and upon the same day the grand jury returned into open court at Muscogee, Ind. T., a new indictment against the defendant, for murder. On the 22d day of December, A. D. 1897, the defendant was found guilty of the crime of murder, and on the 24th day of December, A. D. 1897, judgment of the court was pronounced upon said defendant, sentencing him to death.

On February 11, 1898, plaintiff in error, through his attorney, W. H. Twine, filed a petition for a writ of error from the Supreme Court of the United States, and also filed his specification of error. A writ of error was allowed by Hon. David J. Brewer, Associate Justice, on the 19th day of February, 1898, and on the 23d day of February, 1898, service of the citation issued out of this honorable court was acknowledged. A transcript of the entire record was filed in the office of the clerk of the Supreme Court of the United States on March 1, 1898. The Government has filed its motion to dismiss the writ of error in said case for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

The United States court in the Indian Territory was established by an act of Congress approved March 1, 1889 (Sup. R. S. U. S., vol. 1, 2d ed., p. 670). No jurisdiction over felonies was conferred upon this court. Appeals and writs of error were allowed to the Supreme Court of the United States where the amount in dispute exceeded $1,000. (See sec. 5 of said act.)

On February 6, 1889 (Sup. R. S. U. S., vol. 1, 2d ed., p. 638), Congress passed an act providing for writs of error in capital cases. So much of section 6 of said act as is applicable is as follows:

> SEC. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court, against the respondent, shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe.

On May 2, 1890 (Sup. R. S. U. S., vol. 1, 2d ed., p. 732), two additional places were named for the holding of court in the Indian Territory. The court was divided into three divisions, and certain chapters of the general laws of the State of Arkansas, as found in Mansfield's Digest, were adopted "in so far as applicable," and put in force in the Indian Territory. Section 42 of said act is as follows:

> SEC. 42. That appeals and writs of error may be taken and prosecuted from the decisions of the

> United States court in the Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act.

On March 3, 1891, Congress established United States circuit courts of appeals. (Sup. R. S. U. S., vol. 1, 2d ed., p. 901.) So much of section 5 of said act as is pertinent herein is as follows:

> That appeals and writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In cases of conviction of a capital or otherwise infamous crime.

That appeals and writs of error from the United States court in the Indian Territory are not to be taken under said section is shown by the enactment of section 13 of said act, which is as follows:

> SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under this act.

On March 1, 1895, Congress passed an act (Sup. R. S. U. S., vol. 2, Nos. 1–5, pp. 392–398) dividing the United States court in the Indian Territory into three judicial districts, and provided for the appointment of two additional judges and for the creation of the United States court of appeals in the Indian Territory, and adopted as a Federal statute, without qualification or

modification, chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, entitled "Criminal procedure." The language of the act adopting chapter 46 of Mansfield's Digest is as follows:

> * * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal Law," except as to the crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-six of said laws of Arkansas contained in said digest, entitled "Criminal Procedure," and chapter ninety-one of said general laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended to and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory. * * *

Section 11 of said act defining the jurisdiction and powers of the United States court of appeals in the Indian Territory, in so far as the same is applicable, is as follows:

> SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court.
>
> And said court shall have such jurisdiction and powers in said Indian Territory, and such general superintending control over the courts thereof, as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and

decision of causes, so far as they are applicable, shall be and they are hereby extended over and put in force in the Indian Territory.

And appeals and writs of error from said court in said districts to said appellate court in criminal cases shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest by this act put in force in the Indian Territory. * * *

Writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States. * * *

Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year at such times and for such periods as may be fixed by the court.

Section 13 of said act is as follows:

SEC. 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

On January 20, 1897, Congress passed an act (Sup. R. S. U. S., vol. 2, No. 6, p. 541) to withdraw from the Supreme Court jurisdiction of infamous offenses not capital and confer the same on the circuit court of appeals, which said act is as follows:

That so much of section five of the act entitled "An act to establish circuit courts of appeals and to

define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words "or other infamous," so that the same will read "in cases of conviction of a capital crime," and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital:

Provided, That no case now pending in the Supreme Court, or in which an appeal or writ of error shall have been taken or sued out before the passage of this act, shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this act had not been passed.

These are all the acts of Congress upon the subject. Neither the United States court for the northern district of the Indian Territory, to which the writ of error was sued out, nor the United States court of appeals in the Indian Territory is a circuit or district court of the United States. The equity practice of the circuit court of the United States does not prevail in the Indian Territory, because the practice is governed by the code of civil procedure of Arkansas, found in Mansfield's Digest and adopted by act of Congress approved May 2, 1890.

Section 16 of the act of Congress approved March 1, 1889, establishing the United States court in the Indian Territory, is as follows:

That the judge of the court herein established shall have the same authority to issue writs of habeas

corpus, injunction, mandamus, and other remedial process as exists in the circuit court of the United States.

Section 2 of the act of Congress approved March 1, 1895, is as follows:

> The judges shall have, within the judicial districts for which they are appointed, all such authority, both in term time and vacation, as to all matters and causes, both criminal and civil, pending or that may be brought in said districts, and shall have the same superintending control over commissioners' courts therein, and the same authority in the judicial districts to issue writs of habeas corpus and prohibition, injunction, mandamus, certiorari, and other remedial and final process as is now by law invested in the judge of the United States court in the Indian Territory or in the circuit and district courts of the United States.

These provisions of law define the powers of the judges and confer additional authority upon them. This authority specifically conferred upon the judges can not make the courts over which they preside circuit or district courts within the meaning of the laws of the United States. A judge of the United States court in the Indian Territory is not under the direction or control of the circuit judges of the United States for the eighth judicial circuit, to which circuit the Indian Territory is attached for judicial purposes. They can not be assigned to try cases in any other district outside of the Indian Territory, and the authority of each judge to hold court in another district than the one to which he is assigned is specifically provided by the act of Congress approved March 1, 1895.

The Supreme Court of the United States in the case of *In re Mills* (135 U. S., 267–268), in passing upon a criminal case from the western district of Arkansas, which was pending in said court upon a writ of error and in which it was maintained by the plaintiff in error that the jurisdiction conferred upon the United States court in the Indian Territory under the act of Congress approved March, 1889, ousted the United States court for the western district of Arkansas of jurisdiction of said crime, said:

> The provisions of the Revised Statutes relating to impaneling of grand jurors for the district and circuit courts, title 13, chapter 15, do not apply to the court established in the Indian Territory by the act of March 1, 1889, for although the latter is a court of the United States *it is not a district or circuit court of the United States.*
>
> *Reynolds* v. *United States*, 98 U. S., 145–154.
> *Ex parte Farley, Ex parte Wilson*, 40 Fed. Rep. 66.

The authority and jurisdiction of the United States court in the Indian Territory is derived solely from the three acts of Congress hereinbefore mentioned. The court in the Indian Territory is divided into three judicial districts, the northern, central, and southern, and in each district there is a judge, attorney, marshal, and clerk, and there is an additional judge appointed under the provisions of the act of Congress approved June 7, 1897. The court in the Indian Territory enforces not only all the criminal laws of the United States, as provided in section 31 of the act of Congress approved May 2, 1890, hereinbefore referred to, but also enforces the

criminal laws of the State of Arkansas, and has jurisdiction over a large class of crimes and offenses which neither the district nor circuit courts of the United States have cognizance of. The mode of procedure in criminal causes is regulated entirely since the passage of the act of Congress approved March 1, 1895, by chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, and under section 13 of said act every other Federal statute in conflict with any provision found in chapter 46 of Mansfield's Digest, entitled "Criminal procedure," is repealed, and not in force in the Indian Territory. The laws of Arkansas, adopted and put in force in the Indian Territory, are as much acts of Congress and have the same force and effect as if they had been adopted by Congress without reference to their prior existence in the State of Arkansas, and the same force and effect as if they had been set forth in extenso in the act adopting them. (See *Leak Glove Mfg. Co.* v. *Needles et al.*, 69 Fed. Rep., 68.)

The act of Congress approved February 6, 1889, was the first act providing for appellate jurisdiction of the Supreme Court of the United States in capital cases. This act was modified and repealed by the act of Congress approved March 3, 1891, creating United States circuit courts of appeals, and Congress added to the jurisdiction of capital offenses then held by the Supreme Court of the United States, "all infamous offenses," and that was the law when the act of Congress of March 1, 1895, was approved creating the United States court of appeals in the Indian Territory. There was no saving clause

concerning appeals and writs of error in this latter act, and the general rule is that if a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall with the law.

Railroad Co. v. *Grant*, 98 U. S., 398.
Gurnee v. *Patrick County*, 137 U. S., 141.
Cincinnati Safe and Lock Co. v. *Grand Rapids Safe Dep. Co.*, 146 U. S., 54.
Wanton v. *Dewolf*, 142 U. S., 138.
Hubbard v. *Soby*, 146 U. S., 56.
National Exchange Bank v. *Peters*, 144 U. S., 570.
Ogden v. *United States*, 148 U. S., 390.

At the time of the passage of the act of March 1, 1895, there were then pending in the United States circuit court of appeals for the eighth judicial circuit five cases from the United States court in the Indian Territory, and under the decisions above cited the court of appeals held that its jurisdiction to pass upon these cases was taken away by the act of Congress approved March 1, 1895, and that this act repealed section 13 of the act of Congress approved March 3, 1891, hereinbefore cited and set forth.

The act of March 1, 1895, provided that all appeals and writs of error should be taken from the several courts in the Territory to the United States court of appeals created by that act, without any exception, civil or criminal. As said by Southerland upon statutory construction:

> An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and if, by the language used, a thing is limited to be done in a particular form or manner, it in-

cludes a negative that it shall not be done otherwise. (See Southerland on Statutory Construction, section 140, citing *Wells* v. *Supervisors*, 102 U. S., 625.)

Before the mandate of the United States circuit court of appeals was sent down in those cases Congress remedied this omission in the act of March 1, 1895, by an act approved February 8, 1896 (Sup. R. S. U. S., vol. 2, No. 6, p. 446), which act is as follows:

> That the jurisdiction of the United States circuit court of appeals for the eighth judicial circuit be, and is hereby, extended to all suits at law or equity now pending therein upon writ of error to or appealed from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals but for the act of Congress approved March first, eighteen hundred and ninety-five, entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes."

The cases were reinstated and proceeded to final determination.

Section 11 of the act of March 1, 1895, hereinbefore set forth, provided for an entirely new and different mode of appellate procedure from the trial court in the Indian Territory. Prior to its passage the courts in the Indian Territory were upon the same basis as the circuit and district courts of the United States under the provisions of section 13 of the act of Congress approved March 3, 1891. See *McLish* v. *Roff* (141 U. S., 664), in which the court says:

> The writ of error is taken under the act of March 3, 1891 (26 Stat., 826, c. 517), which, as we have

decided in *In re Claasen* (140 U. S., 200), went immediately into effect on its enactment. The thirteenth section of that act placed the United States court in the Indian Territory on the same footing with regard to writs of error and appeals to this court as that occupied by the circuit and district courts of the United States.

Section 11 of the act of March 1, 1895, provides:

> And appeals and writs of error from said court in said districts to the said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter 46 of said Mansfield's Digest by this act put in force in the Indian Territory.

All criminal cases, whether capital, infamous, or misdemeanor, are tried under the provisions of chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, put in force by said act. It is the law of Congress for the procedure of the United States court in the Indian Territory in criminal causes, and its provisions concerning writs of error and appeals must be followed in taking the same to the United States court of appeals in the Indian Territory. No exception is made of any class of cases. The act of March 1, 1895, extended the jurisdiction of the United States court in the Indian Territory to capital cases and other infamous crimes, the jurisdiction of which had heretofore vested in the United States courts at Fort Scott, Kans., Fort Smith, Ark., and Paris, Tex., and provided that all such offenses shall be prosecuted in the United States court in the Indian Territory after the first day of September, 1896. (See section 9 of said act.)

From this provision it will be seen that Congress intended that on and after the 1st day of September, 1896, the United States court in the Indian Territory should have exclusive jurisdiction of all offenses, of whatsoever character, committed within the Indian Territory, and that they should be tried in the trial courts thereof under the provisions of chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, entitled "Criminal procedure," and that from the trial court an appeal or writ of error in any of said cases should be taken to the United States court of appeals in the Indian Territory, under chapter 46 of Mansfield's Digest, put in force in said Indian Territory by said act. From March 1, 1896, all appeals and writs of error in criminal cases have been taken to the United States court of appeals in the Indian Territory until the present writ of error was sued out. That the United States court of appeals has exercised jurisdiction of capital cases upon appeal from the United States court for the southern district of the Indian Territory for the crime of murder, see *Watkins* v. *The United States*, 41 Southwestern Rep., 1044.

It may be claimed that the Supreme Court of the United States has jurisdiction of the writ of error from the United States court for the northern district of the Indian Territory in a capital case under the provisions of the act of Congress approved January 20, 1897, hereinbefore set forth. That this contention can not be maintained we believe is clear, for the reason that the United States court for the northern district of the

Indian Territory is not a circuit court of the United States under the decisions hereinbefore cited. The act of Congress of January 20, 1897, was amendatory solely to section 5 of the act of March 3, 1891, and no appeal was ever allowed from the United States court in the Indian Territory under section 5 of said act of March 3, 1891, but only because of the provisions of section 13 of said act, which has been repealed by the act of Congress approved March 1, 1895, establishing the United States court of appeals in the Indian Territory. If that contention were correct, then, under the same reasoning, a writ of error could be sued out from the trial court in the Indian Territory direct to the United States circuit court of appeals for the eighth judicial circuit in an infamous offense not capital. That this can not be done the United States circuit court of appeals has already decided. (See *Miller* v. *C. O. & G. Rwy. Co.*, 72 Fed. Rep., 289.)

But it may be maintained that a writ of error may still be sued out to the United States court in the Indian Territory from the Supreme Court of the United States under section 6 of the act of Congress approved February 6, 1889. We do not think, however, that such a position would be well taken, for the reason that the very language of section 11 of the act of Congress approved March 1, 1895, provides for the express manner of appeal in all criminal cases to the United States court of appeals in the Indian Territory, and that where an express and particular mode of taking an appeal or writ of error to a specific court is provided for by statute it necessarily repeals all statutes conflicting therewith.

(See Southerland on Statutory Construction, section 140 and cases cited.)

But it is not necessary to look for an implied repeal, as section 13 of this same act expressly repeals all acts of the United States in conflict with the provisions contained in section 11 of said act of March 1, 1895, or in conflict with any other provision contained in said act.

The act of February 6, 1889, has already been construed by this court. The supreme court of the District of Columbia is a court of the United States as much so as the United States court in the Indian Territory or the United States court of appeals in the Indian Territory. (See *Embry* v. *Palmer*, 107 U. S., 10.)

In the case of *Cross* v. *United States* (145 U. S., 571), the act of February 6, 1889, was passed upon. In that case it is said:

> It is contended on behalf of the Government that the writ of error will not lie because the supreme court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States* (141 U. S., 174) is cited with the decisions referred to therein as sustaining that view; but it is to be remembered that that case referred to territorial courts only, and, moreover, if the disposal of the motion turned on this point, the words "any court of the United States" are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ

of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of the trial court that may be reexamined upon the application of the respondent, and it is to that court the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at nisi prius. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error "shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this.

See also *Cross* v. *Burke*, 146 U. S., 84.

In re Heath, 144 U. S., 92.

That the United States court of appeals in the Indian Territory is not a circuit court of the United States see *In re Mills*, 135 U. S., 267–268.

It is an appellate court, and its decisions are final unless made subject to review by some express provision of law. The only provision relating to writs of error and appeals from the United States court of appeals in the Indian

Territory is contained in section 11 of the act of March 1, 1895, and is as follows:

> Appeals and writs of error from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States.

This provision would not apply to capital cases, and there is no provision of law providing for a writ of error in a capital case to the United States court of appeals in the Indian Territory.

It would seem that the court of appeals in the Indian Territory, being a court of the United States, is analogous to the supreme court of the District of Columbia, and bears the same relation to the United States court in the Indian Territory that the supreme court of the District of Columbia bore to the inferior courts of the District of Columbia. No appeal could be taken or writ of error sued out to the supreme court of the District of Columbia in a capital case because, as this court has said in *Ex parte Bigelow* (113 U. S., 329):

> No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain.

We are, therefore, in view of the statutes and decisions above cited, of the opinion that the Supreme Court of the United States has no appellate jurisdiction of capital cases from the United States court for the northern

district of the Indian Territory, and that said appellate jurisdiction is by section 11 of the act of Congress approved March 1, 1895, hereinbefore cited and set forth, vested exclusively and finally in the United States court of appeals in the Indian Territory, and not in this honorable court.

In conclusion, it may be proper to say that this motion is submitted because of the fact that there are now pending in the Indian Territory about one hundred murder cases. Convictions will doubtless be had in many of these cases, and in all such cases of conviction writs of error will no doubt be sued out of this court, or to the United States court of appeals, if it shall be determined that that court has jurisdiction of such cases.

Notices of the foregoing motion have been served upon the plaintiffs in error and their counsel in the court below, and proof of service filed in the clerk's office.

JOHN K. RICHARDS,
Solicitor-General.

P. L. SOPER,
United States Attorney,
Northern District of the Indian Territory.